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No. 97-1748

In the Supreme Court of the United States

OCTOBER TERM, 1997

ALFRED RASO, ET AL., PETITIONERS

v.

MARISA LAGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a housing development plan that sets aside some units for former residents of the area in which the project is located and makes other units available to all others through a lottery imposes a racial classification subject to strict scrutiny.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 63a-83a) is reported at 135 F.3d 11. The opinion of the district court (Pet. App. 22a-62a) is reported at 958 F. Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1998. The petition for a writ of certiorari was filed on April 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1959, as part of an urban renewal project, the City of Boston, Massachusetts took title by eminent domain to a tract of land known as the Old West End. Pet. App. 25a. That action displaced approximately three thousand households. *Ibid.*

In 1991, the Boston Redevelopment Authority (BRA) contracted with a private developer to build a residential development in the Old West End called West End Place. Pet. App. 65a-66a. The agreement between the BRA and the developer contained two terms that mirrored provisions in Massachusetts law. *Id.* at 66a. First, the developer was directed "'to give preference in the selection of tenants'" to families that had been displaced from the area by urban renewal activities. *Ibid.* (quoting Mass. Gen. Laws ch. 121B, § 49 (1986)). Second, the developer was required "'to comply with such other conditions as are deemed necessary to carry out the * * * requirements of federal legislation or regulations under which loans, grants or contributions have been made or agreed to be made to meet a part of the cost of the project.'" *Ibid.* The BRA also required the developer to work closely with former West Enders; toward that end a number of former West Enders formed the Old West End Housing Corporation. *Id.* at 67a.

The developer sought funding from various sources, including the federal government. Pet. App. 67a. The United States Department of Housing and Urban Development (HUD) agreed to fund a grant of $2.5 million for construction, and committed $7 million in rent subsidies for the low-income units in West End Place. *Ibid.* Those funds were contingent upon com-

pliance with the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.* *Ibid.*

The FHA requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" the policies of the Act. 42 U.S.C. 3608(e)(5). Consistent with that mandate, HUD's regulations require applicants for HUD funds to submit an "affirmative fair housing marketing plan." 24 C.F.R. 200.625. Such plans "shall typically involve publicizing to minority persons the availability of housing opportunities regardless of race, color, religion, sex, handicap or familial status or national origin." 24 C.F.R. 200.620. HUD is also subject to a 1991 consent decree that is based on a district court finding that HUD failed to conduct its programs and activities in the Boston area so as to affirmatively further the purposes of the FHA. Pet. App. 67a. That decree provides that the affirmative fair housing marketing plans that are submitted by applicants for HUD funds "shall have as their goal and measure of success the achievement of a racial composition, in HUD-assisted housing located in neighborhoods which are predominantly white, which reflects the racial composition of the City as a whole." *Id.* at 3a-4a. The consent decree also states that "[n]othing herein shall constitute or be construed as requiring a quota." *Id.* at 4a.

Because minorities constituted approximately 41% of the City's population, but only 2% of the former West Enders, HUD concluded that the FHA and the consent decree would not permit it to authorize federal funding if the tenant-selection plan set aside 100% of the new units for displaced West Enders. Pet. App. 68a. The developer, the government agencies, and the Old West End Housing Corporation submitted

the matter to a mediator, who formulated a plan under which 55% of the new units would be set aside for former West Enders, and the remaining 45% of the new units would be made available to all other applicants through a lottery. *Id.* at 68a. The developer, the BRA, and HUD agreed to the mediator's plan, which was adopted by the developer and approved by HUD in 1996. *Ibid.* The Old West End Housing Corporation did not agree to the plan. *Ibid.*

2. In 1996, petitioners, who are four former West Enders and the Old West End Housing Corporation, filed suit in federal district court against the BRA and its director, HUD and its Secretary, the City of Boston and various City officials, and the developer and others associated with it. Pet. App. 70a. Petitioners alleged, *inter alia*, that the tenant selection plan imposed a racial classification, in violation of the Equal Protection Clause. *Id.* at 71a.

The district court dismissed the complaint. Pet. App. 22a-62a. The court held that the complaint failed to state an equal protection claim, because the tenant selection plan did not "provide any 'preference' in the assignment of units at West End Place based on race." *Id.* at 55a.

3. The court of appeals affirmed. Pet. App. 63a-83a. The court held that HUD's conditioning of federal funds for West End Place on the developer's agreement to make some units available to non-West Enders did not embody a racial classification. *Id.* at 72a-76a. The court explained that, while HUD's action reflected a concern about the racial effect of an unlimited preference for West Enders, a racial concern is not equivalent to a racial classification. *Id.* at 72a-73a. The court observed that "[e]very antidiscrimination statute aimed at racial discrimination,

and every enforcement measure taken under such a statute, reflect[s] a concern with race." *Id.* at 73a. That concern with race, the court stated, "does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause." *Ibid.*

Relying on *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), the court of appeals noted that a racial classification "normally refers to a governmental standard, preferentially favorable to one race or another, for the distribution of benefits." Pet. App. 73a. The court held that the challenged selection plan did not impose such a racial preference, since "the apartments freed from the statutory preference are made available to *all* applicants regardless of race." *Ibid.* The court found no case requiring the government to show "a compelling interest, or narrow tailoring of remedies, for a condition framed so as to secure *equal* treatment of applicants regardless of race." *Id.* at 74a.

The court concluded that strict scrutiny would apply if HUD had a practice of challenging displaced resident preferences only when they effectively exclude blacks and not when they effectively exclude whites. Pet. App. 75a. The court concluded, however, that petitioners had not alleged dissimilar treatment of that kind. *Id.* at 76a.

Judge Stahl dissented. Pet. App. 79a-83a. Judge Stahl read petitioners' complaint to allege that HUD would not have challenged a statutory preference benefitting a predominantly minority group. *Id.* at 81a. Even accepting the majority's construction of the complaint, however, Judge Stahl would have subjected the plan at issue to strict scrutiny. *Id.* at 81a-

83a. According to Judge Stahl, strict scrutiny was warranted because the curtailment of the preference for West Enders "had the effect of depriving [petitioners] of a benefit and was prompted by the fact that [petitioners] are mostly white." *Id.* at 83a.

ARGUMENT

1. Petitioners contend (Pet. 8-9) that the tenant selection plan for West End Place imposes a racial classification subject to strict scrutiny under *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995). That contention is without merit and does not warrant review.

In *Adarand*, a white subcontractor challenged a federal subcontracting program that authorized additional compensation for contractors who used socially and economically disadvantaged subcontractors and presumed that blacks, Hispanics, Native Americans, Asian Pacific Americans, and other minorities were socially and economically disadvantaged. 515 U.S. at 205-206. The Court noted that the presumption of disadvantage involved a classification "based explicitly on race," *id.* at 213, and it held that such explicit racial classifications must satisfy strict scrutiny when they subject persons of a particular race to "unequal treatment." *Id.* at 224.

The tenant selection plan at issue in this case is not subject to strict scrutiny under *Adarand*. The plan sets aside some units for former West Enders on a lottery basis, and it makes other units available to non-West Enders on a lottery basis. The selection plan therefore explicitly classifies on the basis of West-Ender status, not on the basis of race, and it does not impose a racial preference of any kind. Blacks and whites who are former West Enders have

an equal opportunity to obtain the housing that is set aside for former West Enders, and blacks and whites who are not West Enders have an equal opportunity to obtain the housing that is set aside for non-West Enders. Because the tenant selection plan relies on a race-neutral method of allocating housing opportunities, and does not employ an explicit racial classification that prefers members of one race over the other, the court of appeals correctly concluded that the plan is not subject to strict scrutiny under *Adarand*.

Petitioners contend (Pet. 11-17) that the plan imposes a racial classification, because HUD's objection to extending a West Ender preference to all units was that it would effectively exclude minorities from West End Place and that objection prompted a reduction in the number of units set aside for West Enders. As the court of appeals correctly concluded, that contention incorrectly equates a "racial concern" with a "racial classification." Pet. App. 72a-73a. As the court noted, "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect[s] a concern with race," but "[t]hat does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause." *Id.* at 73a. While the racially exclusionary effect of the West Ender preference triggered HUD's objection to the original plan, the critical point is that the governmental actors responded to that objection by agreeing to a race-neutral selection plan that was designed to secure equal treatment to all applicants regardless of their race. As the court of appeals concluded (*id.* at 74a), no case has subjected such a race-neutral plan to strict scrutiny simply because it was prompted by racial concerns.

Under petitioners' theory, a totally race-neutral selection system—such as the lottery system used in this case—becomes a racial classification subject to strict scrutiny, if it is adopted in order to avoid the discriminatory effects of some other selection system. In the employment setting, that would mean that when a State changes the tests it administers to job applicants, or moves from reliance on written tests to reliance on job performance evaluations, the new race-neutral selection criterion becomes a racial classification subject to strict scrutiny if the change is motivated by a concern about the discriminatory effects of the old system. Similarly, a State is ordinarily free to eliminate its veterans preference and rely on a system of pure merit selection, but if it does so because of the adverse effect of a veterans preference on employment opportunities for women, then its merit selection system becomes a gender-based classification subject to heightened scrutiny. The effort to avoid discrimination and discriminatory effects is not so suspect a purpose that it converts a facially race-neutral selection system into a suspect classification. When, as here, the government uses a race-neutral method of allocating benefits in order to provide equal opportunity to all applicants regardless of race, strict scrutiny does not apply.[1]

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[1] The court of appeals concluded that petitioner's complaint did not allege that HUD had a practice of challenging displaced resident preferences only when they effectively exclude blacks and not when they effectively exclude whites, Pet. App. 75a-76a, and petitioners do not take issue with that assessment here. As the court of appeals noted (*ibid.*), such an allegation of differential treatment would raise different questions from the one presented in this case.

2. Petitioners assert (Pet. 9-10) that the decision below conflicts with the D.C. Circuit's decision in *Lutheran Church-Missouri Synod* v. *FCC*, 1998 WL 168712 (1998). In that case, however, the D.C. Circuit read the FCC regulations at issue to "oblige stations to grant some degree of preference to minorities in hiring." *Id.* at *8. For that reason, the court subjected the FCC regulations to strict scrutiny. *Id.* at *10. Since the tenant selection plan at issue in this case does not in any way require the developer to grant a preference to minorities in housing, and no one has suggested that it does, there is no conflict between *Lutheran Church* and the decision below. Indeed, in *Lutheran Church*, the D.C. Circuit specifically distinguished the First Circuit's decision in the present case on the ground that "HUD's racially neutral housing requirement no more implicated the equal protection guarantee than a nondiscrimination statute like Title VII." *Id.* at *14 n.8.[2]

For similar reasons, petitioners err in asserting (Pet. 10) that the decision below conflicts with *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996) and *In re Birmingham Reverse Discrimination Emp. Lit.*, 20 F.3d 1525 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995). In *Hopwood* and *Birmingham*, the government admittedly used race as a factor in allocating a government benefit, and the only question was whether the challenged racial classification satisfied strict scrutiny. *Hopwood*, 78

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[2] The FCC and the United States have sought en banc review in *Lutheran Church*, and have argued that the FCC regulations at issue do not require stations to impose a racial preference in hiring. The D.C. Circuit has not yet acted on the request for en banc review.

F.3d at 938; *Birmingham*, 20 F.3d at 1535-1536. In contrast, the tenant selection plan at issue in this case does not use a racial classification, and nothing in *Hopwood* or *Birmingham* suggests otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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